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IN THE

Supreme Court of the United States

ARISTA RECORDS, LLC, ET AL.,

Petitioners,

—v.—

LAUNCH MEDIA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Copyright Act requires an Internet music service that streams sound recordings to listeners to obtain licenses from the sound recording copyright owners if the service is an "interactive service." Section 114(j)(7) defines an "interactive service" as one that "enables a member of the public to receive a transmission of a program specially created for the recipient." The legislative history of that section explains that "personalized transmissions—those that are specially created for a particular individual—are to be considered interactive."

The questions presented are:

1. Whether the United States Court of Appeals for the Second Circuit committed error in concluding that despite the statutory definition, a personalized Internet music service that makes transmissions specially created for the recipient is not an "interactive service" unless it causes diminishing record sales.

2. Whether the court of appeals' refusal to follow the plain language of the statutory definition of "interactive" so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power.

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioners here and appellants below are Arista Records, LLC, formerly known as Arista Records, Inc.; Bad Boy Records; Arista Music, formerly known as BMG Music; and Zomba Recording LLC, formerly known as Zomba Recording Corporation, all of which are wholly or partly owned subsidiaries of Sony Music Entertainment, a wholly owned subsidiary of Sony Corporation of America, or were formerly distributed by Arista Music, a general partnership ultimately held by Sony Music Entertainment. The ultimate parent of Sony Music Entertainment is Sony Corporation.

The respondent here and appellee below is Launch Media, Inc., which is wholly owned by Yahoo! Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners state as follows:

Petitioners Arista Records, LLC, formerly known as Arista Records, Inc.; Bad Boy Records; Arista Music, formerly known as BMG Music; and Zomba Recording LLC, formerly known as Zomba Recording Corporation, are wholly or partly owned subsidiaries of Sony Music Entertainment, a wholly owned subsidiary of Sony Corporation of America, or were formerly distributed by Arista Music, a general partnership ultimately owned by Sony Music Entertainment. The ultimate parent of Sony Music Entertainment is Sony Corporation, a publicly held Japanese company which trades, through American Depository Receipts, on the New York Stock Exchange.

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Record Excerpts:

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OPINIONS BELOW

The court of appeals opinion is reported at 578 F.3d 148 (2d Cir. 2009), and reprinted at App. 1a-34a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on August 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Copyright Act, 17 U.S.C. § 101 *et seq.*, particularly section 114(j)(7), reproduced at App. 35a.

STATEMENT OF THE CASE

A. Introduction

This case involves the construction of the statutory term "interactive service," as defined by Congress in the Digital Millennium Copyright Act of 1998 ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), *codified at* 17 U.S.C. § 114(j)(7). The petitioners are recorded music companies that own copyrights in sound recordings. The respondent is the operator of an Internet music service called LAUNCHcast, owned by Yahoo! Inc., that streamed copyrighted sound recordings to listeners. Under the Copyright Act, Internet music services that are "interactive services" are obligated to negotiate voluntary licenses with the owners of the copyrights in the sound recordings, while services that are not "interactive services" may operate without negotiated licenses.

The DMCA defines an "interactive service" as one "that enables a member of the public to receive a transmission of a program specially created for the recipient." App. at 35a (17 U.S.C. § 114(j)(7)). The legislative history of that definition states that "personalized transmissions—those that are specially created for a particular individual—are to be considered interactive. The recipient of the transmission need not select the particular recordings in the program for it to be considered personalized, for example, the recipient might identify certain artists that become the basis of the personal program." App. at 36a (H.R. Conf. Rep. No. 105-796, at 87 (1998)).

The facts regarding operation of the respondent's service were not disputed. As the opinion of the court of appeals acknowledged, respondent's LAUNCHcast service was thoroughly personalized. App. at 19a-26a, 29a. LAUNCHcast provided every user of the service with a unique program of sound recordings reflecting that specific user's expressed tastes and preferences, which the user was permitted to enter continuously and in multiple ways. Not only could a user identify certain artists that became the basis of her personal program, but every time the user rated an additional artist the personal program was regenerated to make certain that music from that artist was soon played. App. at 19a-20a. The personalization features of the LAUNCHcast service were touted in advertising as making it more attractive to consumers than competing Internet music services, and even respondent's SEC 10-K filings observed that "Launch's consumers are not confined to receiving music content in the programmed, linear sequences broadcast by radio and television. Instead, we deliver personalized music content to

our users in an interactive format based on their musical tastes and preferences." App. at 60a. Proud of its novel personalization features, respondent filed a patent application for its LAUNCHcast invention that "can be said to 'microcast,' or 'narrowcast' the content of personalized songlists to individual listening stations or users." App. at 47a.

After arraying the evidence that LAUNCHcast enabled members of the public to receive transmissions of programs specially created for the individual recipient, the court of appeals nonetheless concluded that the service was not interactive. The court held:

> Launch does not deny that each playlist generated when a LAUNCHcast user selects a radio station is unique to that user at that particular time. However, this does not necessarily make the LAUNCHcast playlist specially created for the user. Based on a review of how LAUNCHcast functions, it is clear that LAUNCHcast does not provide a specially created program within the meaning of § 114(j)(7) because the webcasting service does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby—in the aggregate—diminishing record sales.

App. at 29a (footnotes omitted). The court concluded that "control," "predictability," and "diminution of record sales"—none of which was ever mentioned in the statutory definition or its legislative history—determined whether a service was interactive. The panel thereby re-balanced the interests between digital music providers and sound recording copyright holders that Congress had

addressed in the DMCA, ignoring that Congress chose to define "personalized transmissions" as interactive.

This judicial usurpation of Congress's legislative function has devastating implications for the companies that create and use digital sound recordings. The Court of Appeals for the Second Circuit has long been regarded as the most influential of the lower courts in copyright matters, yet it has established a control/predictability/diminution test that could never be applied in practice. No Internet music service could ever know in advance whether it was providing enough control and predictability to cause a diminution of record sales. And it is difficult to imagine how a copyright owner could ever prove that any particular Internet music service would cause diminishing sales of records, an issue that would undoubtedly lead to years of burdensome litigation.

An authoritative determination from this Court as to the proper construction of the term "interactive service" would be of great value to the recorded music companies that own sound recording copyrights, the Internet and mobile phone services that stream digital sound recordings, and the consumers who enjoy listening to them. Granting certiorari would enable copyright owners and users alike to avoid further litigation and to have more predictability in their business operations, enabling them to provide a broader array of services to the public.

Moreover, granting certiorari would enable the Court to correct an error of law so serious and so indefensible as to invite the exercise of the Court's supervisory power. The decision below was not the product of simple legal error: It was the product

judicial lawmaking—substituting the panel's policy preferences for the statutory definition adopted by Congress. But the role of federal judges is to apply the law—to call the balls and strikes—not to rewrite the law to their own liking. This Court should exercise its supervisory authority to ensure that the lower courts act consistently with the constitutional doctrine of separation of powers.

B. The Statutory Definition of an "Interactive" Internet Music Service

Congress twice defined the term "interactive service" by statute, once in 1995, and again in 1998.

In 1995, Congress granted copyright owners the exclusive right to perform sound recordings publicly by means of a digital audio transmission, such as an Internet stream. *See* S. Rep. No. 104-128, at 10 (1995); H.R. Rep. No. 104-274, at 10 (1995). That right was codified in the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Pub. L. 104-39, 109 Stat. 336 (Nov. 1, 1995). *See* 17 U.S.C. § 106(6). But the DPRA limited the new digital performance right by creating an exemption for non-interactive Internet music services:

> *Exempt transmissions and retransmissions.*—The performance of a sound recording publicly by means of a digital audio transmission, *other than as part of an interactive service*, is not an infringement of section 106(6) . . . .

DPRA § 3(d)(1), *codified at* 17 U.S.C. § 114(d)(1) (emphasis supplied). "Interactive service" was defined in pertinent part:

> An "interactive service" is one that enables a member of the public to receive, on request, a

> transmission of a particular sound recording chosen by or on behalf of the recipient.

DPRA § 3(j)(4). The DPRA legislative history characterized an interactive service as essentially an "audio-on-demand service." H.R. Rep. No. 104-274, at 20. While operators of non-interactive services were not required to obtain sound recording copyright licenses, operators of interactive services were required to negotiate licenses from the copyright owners to transmit sound recordings without liability for infringement.

In 1998, the Digital Millennium Copyright Act amended the definition of "interactive service" in the DPRA to expand its scope. In view of the explosive growth of the Internet and the proliferation of Internet music services between 1995 and 1998,[1] Congress saw the need to broaden the definition of "interactive service" to protect further the rights of sound recording copyright owners. In particular, copyright owners were given the opportunity to negotiate for a share of the greater revenues obtained by personalized Internet music services. *See* Committee on the Judiciary Section-by-Section Analysis of H.R. 2281, at 50 (1998). To implement

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[1] The following table shows the growth in the number of Internet Web sites from 1994 through 1998:

12/94	10,022
06/95	23,500
01/96	100,000
01/97	646,162
01/98	1,834,710
06/98	2,410,067
12/98	3,689,227

Hobbes' Internet Timeline, v.8.2, http://www.zakon.org/robert/internet/timeline/#Growth.

this change, the DMCA added the highlighted language below to the definition of "interactive service," expanding beyond on-demand services to include services that provide a listener with programming specially created for him or her:

> An "interactive service" is one that enables a member of the public to receive *a transmission of a program specially created for the recipient, or* on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.

App. at 35a (17 U.S.C. § 114(j)(7)). The DMCA legislative history explained that this expanded definition was designed to encompass "personalized transmissions":

> *'Subsection 114(j)(7)—"interactive service."* The definition of "interactive service" is amended in several respects. First, personalized transmissions—those that are specially created for a particular individual—are to be considered interactive. The recipient of the transmission need not select the particular recordings in the program for it to be considered personalized, for example, the recipient might identify certain artists that become the basis of the personal program.

App. at 36a (H.R. Conf. Rep. No. 105-796, at 87).

There is nothing ambiguous about that definition. In 1998, one widespread Internet trend was the creation of personalized Web sites based upon demographic and preference information provided by the user. The user of a Web site such as Yahoo! or Excite could either visit the site anonymously and receive

a generic home page, or log in with his user name and password and receive a personalized page reflecting that user's previously expressed interests. *See* Sullivan, Danny, "Excite and Lycos Get More Personal," *Search Engine Watch*, Apr 30, 1998, http://searchenginewatch.com/2166141. It was believed that such personalization made a Web site more attractive to users, resulting in more traffic and correspondingly greater potential advertising revenue for the operator. With the Internet community's recognition that personalization could create additional value, Congress expanded the category of "interactive service" so that some of that value would be shared through negotiation with sound recording copyright owners. Non-interactive sites—which operated as traditional radio stations, streaming music without regard to the identity of the user—continued to be exempt from any requirement to negotiate licenses.

The court of appeals' focus on diminution of record sales as a key factor for determining whether a service was "interactive" stands in stark contrast to the DMCA and its legislative history, neither of which includes a single word about diminution of record sales. Indeed, even the legislative history of the 1995 DPRA, the statute that was abrogated by the enactment of the DMCA, contains only a single reference to diminution: A DPRA Senate report stated that interactive services "pose the greatest threat to traditional record sales." *See* S. Rep. No. 104-128, at 24. But in the DPRA, "interactive service" meant only music-on-demand. Such services likely would threaten traditional record sales, and it is understandable that Congress did not consider the impact of personalized music streaming in 1995,

when the Internet was only beginning to come into widespread use.

But the issues were different by 1998, when the World Wide Web was becoming a household word, and the DMCA expanded the definition of "interactive service" to include personalized transmissions. The express purpose of the DMCA was "to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age." S. Rep. No. 105-190, at 1-2 (1998). The legislative history of the DMCA made no reference to any concern over protecting sales of traditional media; the emphasis was on the relationship between "protecting intellectual property rights" and "promoting the continued growth and development of electronic commerce." H.R. Rep. No. 105-551(II), at 23 (1998). The central aim of the DMCA was to "ensure a thriving electronic marketplace for copyrighted works on the Internet." H.R. Rep. No. 105-551(1), at 9-10 (1998). In expanding the definition of "interactive service," Congress was focused not on protecting sales of records, but on reallocating the revenues received from new forms of electronic commerce among Internet operators, copyright owners, and others. The court of appeals' decision disregarded Congress's careful balancing of those interests.

C. The Respondent's LAUNCHcast Service

Respondent Launch Media, Inc. was founded in 1994. It was a public corporation from 1999 until the summer of 2001, when it was purchased by Yahoo! Inc. Respondent's LAUNCHcast was a Web-based Internet music service that enabled each user to create her own "station" with a unique user name and

password, and then listen to recordings streamed over the Internet. LAUNCHcast users were invited to enter information about their musical preferences, including favorite artists and music genres. Users were invited to rate recording artists, albums, and individual sound recordings on a 0-to-100 scale, and were advised that the higher their rating, the more frequently they would hear the rated selection. If a user did not like a song, she could click on a red "X" button, and it would never be played for her again. Based on the data entered by a user, the LAUNCHcast computers generated a distinct "playlist" of sound recordings to be transmitted one after another to that user. If a user did not wish to hear a song on her playlist, she could click on a skip button and the computer would move to the next recording on the playlist. If a user rated an additional artist (or a number of additional albums or sound recordings) while listening, a new playlist would immediately be generated for her reflecting the new data. LAUNCHcast had more personalization elements than any other Internet music service.

The principal developers of LAUNCHcast were Jeffrey Boulter and Todd Beaupre. According to the patent application they filed, LAUNCHcast was an:

> *individually-tailored Internet media broadcast system* and method. The present invention provides means by which users may individually rate or indicate music, music videos, or other recorded media that they enjoy hearing from a vast musical or other database. Additionally, such users may also indicate the exclusion of music/media that is to their distaste. In doing so the user interaction is limited to that decision-making role that is necessary for the user to

> establish his or her preferences. The Internet radio of the present invention and its method take care of the rest, providing the end user a media or radio channel *tailored to his or her own musical tastes*. In this way, the present invention can be said to "microcast," or "narrowcast" the content of *personalized songlists to individual listening stations or users*.

App. at 47a (emphasis supplied). Messrs. Boulter and Beaupre claimed interactive Internet webcasting as their invention:

> What is claimed is:
>
> 1. A method for broadcasting data streams through a computer network to a user's computer, the steps comprising:
>
> providing a database of data streams;
>
> selecting a data stream according to a selection method;
>
> transmitting one of said data streams to the user's computer;
>
> receiving feedback expressing a preference from the user regarding said transmitted data stream; and
>
> updating said selection method to better reflect said preference of the user; whereby
>
> data streams transmitted to the user are biased according to said preference.

App. at 49a.

Mr. Boulter testified at the trial that LAUNCHcast was designed to provide a unique playlist for each individual user. Mr. Beaupre confirmed that users

could rate artists, songs, and albums throughout a session and that all of that information was used to create a more customized playlist for that user. The more ratings a user provided, the more attuned LAUNCHcast became to providing music suited to that user's preferences. If a song was streamed that the user preferred not to hear, the user could click on a skip button and the service would skip over the unwanted song and move on to the next song in the playlist. If a user disliked a song and never wanted to hear it again on his station, the service allowed the user to exclude the song from all future playlists.

Respondent's internal documents and public statements repeatedly characterized its LAUNCHcast service as "personalized," "customized," and "interactive." The press release announcing LAUNCHcast explained that "[u]nlike traditional Internet 'radio' players that only offer genre-based, pre-programmed channels, LAUNCHcast gives users the opportunity to design their own streaming music station." App. at 43a. In its 1999 10-K report to the SEC, respondent stated, "Launch's consumers are not confined to receiving music content in the programmed, linear sequences broadcast by radio and television. Instead, we deliver personalized music content to our users in an interactive format based on their musical tastes and preferences." App. at 60a.

Respondent's 1999 annual report further boasted about the interactivity of LAUNCHcast:

> LAUNCHcast enables members to design customized streaming music stations, which play a constantly changing selection of songs based on the users' individual preferences. Through song, album and artist ratings, and samples of other community members' stations, LAUNCHcast

> learns to play the music individual members want to hear.

App. at 62a. Senior Launch management explained that "[a]s our members invest more time in contributing their preferences, the customized experience improves, and substantial incentives are built to call our music site home." App. at 65a. Respondent explained in a November 14, 2000 press release that:

> LAUNCHcast is a revolutionary music experience that uses patent-pending technology to put its users in command of their music choices. As users access LAUNCHcast's extensive music library, they rate songs, albums and artists to build a station that truly reflects their individual tastes. Over time, LAUNCHcast learns and intuitively plays the songs music fans like and introduces new music they probably will.

App. at 39a.

D. Proceedings Below

Petitioners, along with other major United States recorded music companies, brought an action against respondent on May 24, 2001, alleging that respondent infringed the copyrights in numerous sound recordings by streaming those recordings to users of an interactive Internet music service without negotiated licenses. Following six years of pretrial discovery and motions practice, the action was tried to a jury in April 2007, and judgment was entered on a jury verdict in favor of the respondent on May 16, 2007.[2] Petitioners appealed.

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[2] The jury had been instructed that they should assess whether LAUNCHcast was "interactive" based on diminution of sales of traditional records. App. at 68a.

On August 21, 2009, the Court of Appeals for the Second Circuit, in a 42-page published opinion, affirmed the judgment for respondent. The court first noted correctly that there was "no material dispute between the parties with regard to how LAUNCHcast works," App. at 6a, and that the case should not have been decided by a jury because the issue of "whether the program is 'interactive' as defined by the statute [is] clearly an issue of law and therefore strictly under the purview of the courts," App. at 7a. The court followed its discussion of the thoroughly personalized character of the LAUNCHcast service with the holding that a personalized service was not necessarily interactive, despite the unambiguous statutory definition and legislative history to the contrary:

> Launch does not deny that *each playlist generated when a LAUNCHcast user selects a radio station is unique to that user at that particular time*. However, this does not necessarily make the LAUNCHcast playlist specially created for the user. Based on a review of how LAUNCHcast functions, it is clear that LAUNCHcast does not provide a specially created program within the meaning of § 114(j)(7) because the webcasting service *does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby—in the aggregate—diminishing record sales*.
>
> . . . .
>
> In short, to the degree that LAUNCHcast's *playlists are uniquely created for each user, that feature does not ensure predictability*.

> Indeed, the unique nature of the playlist helps Launch ensure that it *does not provide a service so specially created for the user that the user ceases to purchase music*. LAUNCHcast listeners do not even enjoy the limited predictability that once graced the AM airwaves on weekends in America when "special requests" represented love-struck adolescents' attempts to communicate their feelings to "that special friend." Therefore, we cannot say LAUNCHcast falls within the scope of the DMCA's definition of an interactive service created for individual users.

App. at 29a, 33a (emphasis supplied and footnotes omitted).

The court of appeals' holding that the test of "interactivity" is whether an Internet music service provides enough "control" and is so "predictable" that the user "ceases to purchase music" bears no resemblance to anything in the statute or its legislative history. Far from requiring control, predictability, or diminution of record sales, Congress provided as an example of an interactive service one in which "the recipient might identify certain artists that become the basis of the personal program," App. at 36a, a description that precisely describes the functioning of LAUNCHcast.

REASONS FOR GRANTING THE WRIT

I. Resolving the Underlying Copyright Issue as to the Proper Definition of "Interactive Service" Will Benefit Sound Recording Copyright Owners and Users and Conserve the Resources of Both this Court and the Lower Courts

The decision of the court of appeals leaves both copyright owners and copyright users in a state of uncertainty about their rights. The respect that the Second Circuit Court of Appeals has earned over the years is too great for its rulings to be ignored, but the ruling in this case is too obviously erroneous to be followed. Neither recorded music companies, nor Internet and mobile music services, nor consumers can be settled in their affairs until the correct statutory interpretation is established.

The court of appeals' decision discards Congress's clear statutory definition in favor of a standard that is entirely unworkable—requiring an evaluation of "control," "predictability," and "diminution of record sales." The court's opinion gives no indication of how much "control" and "predictability" over the selection of sound recordings would make a service interactive. Neither is there any indication of that in the statute, because the statute says nothing about control or predictability. The court appears to view diminution of record sales as a key factor in determining interactivity, but gives no guidance as to how anyone could measure the effect of any one particular Internet music service on diminution, or how the designer of an Internet music service could possibly know in advance the likely level of diminution. Given this unworkable standard, future litigation is

inevitable, as personalized music services continue to be popular on the Internet and over telephones and other mobile devices.

Further litigation would impose substantial burdens on the parties and on the courts. This type of fact-intensive litigation is enormously expensive: Litigation in the lower courts here has gone on for eight years, beginning in May 2001. Respondent changed its lead counsel three times over the course of the litigation. In an application for attorneys' fees, respondent asserted that it incurred legal fees and costs between January 2003 and May 2007 alone totaling some $12 million. Petitioners' costs were about half those of respondent, making total litigation costs over the eight year period some $20 million or more.

That sum does not, of course, encompass the burdens imposed on the courts, jurors, and witnesses. Over the course of eight years of litigation, the district court, among other things, (1) resolved a jurisdictional conflict with the United States District Court for the Central District of California, in which a reactive action had been brought by respondent; (2) conducted eleven in-court conferences with counsel; (3) considered nine discovery motions; (4) resolved hundreds of pages of summary judgment motions; (5) adjudicated twelve motions *in limine*; (6) conducted a two-week jury trial on liability; and (7) decided two motions for attorneys' fees. The court of appeals had to consider two appeals, one addressing the errors of the district court and one addressing respondent's application for attorneys' fees.

By correcting the court of appeals now, the Court would both provide necessary guidance to the par-

ticipants in an on-going industry, who have been left in a state of uncertainty by this decision, and avoid future litigation in the lower courts (and, inevitably, further certiorari petitions). The parties have worked long and hard for eight years to establish the scope and effect of section 114(j)(7), and the court of appeals has defaulted in its obligation to do that.

We respectfully urge the Court to grant a writ of certiorari so that future judicial resources and expenses are not similarly wasted, and recorded music companies and Internet and mobile music services will be able to continue their operations and to invest in new and more sophisticated services with certainty and without risk of copyright violation.

II. The Court Should Exercise Its Supervisory Authority Over the Lower Courts To Require Judges To Enforce Statutes According to Their Terms

The Court has long recognized the fundamental importance to the legal system of decisions that apply the law as written, rather than as some unelected judge might consider desirable. As the Court wrote in *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004):

> The starting point in discerning congressional intent is the existing statutory text, *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999), and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank*,

> *N. A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)).

See also New York City Transit Auth. v. Beazer, 440 U.S. 568, 570-71 (1979). When a term is specifically defined by Congress, the courts are bound to follow that definition. *See, e.g., Hubbard v. United States*, 514 U.S. 695, 708 (1995).

The role of the court of appeals here was to apply the law—the "specially created for the recipient" standard set forth in the DMCA. App. at 35a (17 U.S.C. § 114(j)(7)). If that short, clear, specific, and unambiguous statutory standard were somehow viewed as requiring interpretation, the court of appeals should have consulted the congressional report, which stated that "[t]he recipient of the transmission need not select the particular recordings in the program for it to be considered personalized, for example, the recipient might identify certain artists that become the basis of the personal program." App. at 36a (H.R. Conf. Rep. No. 105-796, at 87). By rejecting both the statutory standard and Congress's expressed intent, and crafting their own control/predictability/diminution test, the circuit judges arrogated congressional authority and committed error of constitutional dimensions.

In an effort to avoid the standard established by Congress, the court of appeals considered the dic-

tionary definitions of the statutory terms "specially" and "created," and then rejected them:

> According to Merriam-Webster's Collegiate Dictionary, "specially" means: (1) "in a special manner"; (2) "for a special purpose"; (3) "in particular" or "specifically"; or (4) "especially." Create, the root of "created," means: (1) "to bring into existence"; (2) "to produce"; (3) to "cause" or "occasion"; or (4) to "design."
>
> These definitions indicate that a "specially created" program is a program produced or designed specifically for the user—not much help defining the terms of the statute in this case.

App. at 8a. But this dictionary exercise actually demonstrates the clarity of the statutory text—a program is interactive if it is "specially created for the recipient"—or, reworked by the court—"produced or designed specifically for the user."

In any event, the court went on from there to observe that sometimes words to do not mean what they mean—particularly, it seems, when the court disagrees with Congress's balancing of competing interests:

> But we should not read the statute so broadly. Justice Oliver Wendell Holmes once wrote that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (internal citation omitted). Holmes's observation seems pertinent here. The meaning of the phrase in question must significantly depend on the context in which Congress chose to employ it.

App. at 8a. "Skin of a living thought"[3] appears to be the court's way of rationalizing its disregard of the plain meaning of the statute.

The court's decision then confounded the legislative history of the 1998 DMCA definition of "interactive service" with the legislative history of the markedly different 1995 DPRA that was being abrogated:

> The language and development of the [DPRA] and DMCA make clear that Congress enacted both statutes to create a narrow copyright in the performance of digital audio transmissions to protect sound recording copyright holders—principally recording companies—from the diminution in record sales. Congress created this narrow right to ensure that "the creation of new sound recordings and musical works [would not] be discouraged," and to prevent the "threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." H.R. Rep. No. 104-274, at 13-14.

App. at 27a.

That citation to H.R. Rep. No. 104-274, however, is to the legislative history of the 1995 DPRA alone, under which only "audio-on-demand" was considered interactive. There is no comparable language anywhere in the statutory text or the legislative his-

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[3] The issue that evoked Justice Holmes's "skin of a living thought" comment was whether the meaning of the word "income" was necessarily identical as used in the Constitution and in the Income Tax Act of 1913. *See Towne v. Eisner*, 245 U.S. 418, 425 (1918). Justice Holmes never suggested that the ordinary meaning of the word "income" could be ignored, or that the amount of tax owed should be based on, for example, the extent to which higher levies would diminish the taxpayer's likely purchases of sheet music.

tory of the DMCA supporting the court's conclusion that interactive services were limited to those that caused a "diminution in record sales." Neither is there anything in the DMCA text or legislative history about "control" and "predictability" as factors to be considered in determining interactivity. The DMCA legislative history is focused on "facilitat[ing] the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age," S. Rep. No. 105-190, at 1-2, and recorded music companies were specifically enabled to negotiate for licenses permitting them to share in the expansion of electronic commerce resulting from personalized Internet music services.

The Court does not often conclude that a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). But if ever there was such a case, this is surely it. The lower court rejected an unambiguous statutory definition, ignored the pertinent legislative history, dismissed applicable dictionary definitions, cited as support the legislative history of an abrogated statute, adopted a legal test impossible to apply in practice, and denied copyright owners the rights that Congress deliberately extended to them. Congress carefully crafted a bright-line rule for determining whether a service is interactive under the Copyright law, and the court of appeals has replaced it with a murky test lacking any clear standards. After eight years of difficult and expensive litigation, the parties find themselves in a legal regime more ambiguous and unpredictable than when they began.

The Court should grant a writ of certiorari in the exercise of its supervision over the lower courts to prevent this sort of serious abuse of the judicial role.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 19, 2009

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: March 17, 2009
Decided: August 21, 2009)

Docket No. 07-2576-cv

Arista Records, LLC, formerly known as Arista Records, Inc., Bad Boy Records, BMG Music, doing business as The RCA Record Label and Zomba Recording LLC, formerly known as Zomba Recording Corporation,

Plaintiffs-Appellants,

Capitol Records, Inc., Virgin Records America, Inc., Sony Music Entertainment, Inc., UMG Recordings Inc., Interscope Records and Motown Records Company L.P.,

Plaintiffs,

—v.—

Launch Media, Inc.,

Defendant-Appellee.

Before:

CALABRESI, WESLEY, *Circuit Judges*,
and DRONEY,* *District Judge*.

Arista Records, LLC, Bad Boy Records, BMG Music, and Zomba Recording LLC (collectively, "BMG"), appeal from the judgment of the United States District Court for the Southern District of New York (Owen, *J.*), and from interlocutory orders merged into the judgment, finding that the webcasting—internet radio—service LAUNCHcast provided by Defendant-Appellee Launch Media, Inc. ("Launch") was not an interactive service within the meaning of 17 U.S.C. § 114(j)(7). We affirm because as a matter of law LAUNCHcast was not an interactive service. It does not provide copyrighted sound recordings on request, nor does it transmit a program specially created for the user within the meaning of § 114(j)(7).

AFFIRMED.

HADRIAN R. KATZ (Sarah M. Brackney, *on the brief*), Arnold & Porter, LLP, Washington, DC (Robert A. Goodman, *on the brief*, New York, NY), *for Plaintiffs-Appellants*.

* The Honorable Christopher F. Droney, Judge of the United States District Court for the District of Connecticut, sitting by designation.

MICHAEL S. ELKIN, (Thomas P. Lane, Shari Markowitz Savitt, *on the brief*), Winston & Strawn LLP, New York, NY, *for Defendant-Appellee.*

WESLEY, *Circuit Judge*:

We are the first federal appellate court called upon to determine whether a webcasting service that provides users with individualized internet radio stations—the content of which can be affected by users' ratings of songs, artists, and albums—is an interactive service within the meaning of 17 U.S.C. § 114(j)(7). If it is an interactive service, the webcasting service would be required to pay individual licensing fees to those copyright holders of the sound recordings of songs the webcasting service plays for its users. If it is not an interactive service, the webcasting service must only pay a statutory licensing fee set by the Copyright Royalty Board. A jury determined that the defendant does not provide an interactive service and therefore is not liable for paying the copyright holders, a group of recording companies, a licensing fee for each individual song. The recording companies appeal claiming that as a matter of law the webcasting service is an interactive service, and alternatively, that the district court's instruction to the jury, as well as its admission and exclusion of certain evidence and testimony, was harmful error.[1] We affirm; the webcasting

[1] The recording companies also ask us to reach an issue of damages calculation and to reassign the case to another dis-

service is not an interactive service as a matter of law.

Background[2]

On May 24, 2001 Arista Records, LLC, Bad Boy Records, BMG Music, and Zomba Recording LLC (collectively, "BMG") brought suit against Launch Media, Inc. ("Launch") alleging that Launch violated provisions of the Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (1998) (the "DMCA"), codified in relevant part in 17 U.S.C. § 114, by willfully infringing sound recording copyrights of BMG from 1999 to 2001. The United States District Court for the Southern District of New York (Owen, *J.*) denied the parties' cross-motions for dismissal under Federal Rule of Civil Procedure 12(b)(6) and summary judgment. The case was tried before a jury, and after the district court denied BMG's motion for judgment as a matter of law, the jury returned a verdict for Launch.

Launch operates an internet radio website, or "webcasting" service, called LAUNCHcast, which enables a user to create "stations" that play songs that are within a particular genre or similar to a particular artist or song the user selects. BMG holds the copyrights in the sound recordings of some of the songs LAUNCHcast plays for users.

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trict court judge. Because we affirm on the issue of law we need not reach these issues.

[2] Plaintiffs-Appellants appeal the judgment of the United States District Court for the Southern District of New York (Owen, *J.*), entered on May 16, 2007, and from interlocutory orders merged into the judgment, finding in favor of Defendant-Appellee Launch Media, Inc., now owned by Yahoo!, Inc. ("Yahoo").

BMG, as a sound recording copyright holder, has no copyright in the general performance of a sound recording, *see* 17 U.S.C. §§ 106(4), 114(a), but BMG does have the exclusive right "to perform the copyrighted [sound recording] publicly by means of a digital audio transmission," 17 U.S.C. § 106(6). Launch does not dispute that LAUNCHcast provides a digital audio transmission within the definition of § 106(6). *See* 17 U.S.C. §§ 101, 114(j)(5). BMG has a right to demand that those who perform—i.e., play or broadcast—its copyrighted sound recording pay an individual licensing fee to BMG if the performance of the sound recording occurs through an "interactive service." *See* 17 U.S.C. § 114(d)(3)(C).

An interactive service is defined as a service "that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording . . . , which is selected by or on behalf of the recipient." *Id.* § 114(j)(7). If a digital audio transmission is not an interactive service and its "primary purpose . . . is to provide to the public such audio or other entertainment programming," *id.* § 114(j)(6), the transmitter need only pay a compulsory or statutory licensing fee set by the Copyright Royalty Board made up of Copyright Royalty Judges appointed by the Library of Congress,[3] *see id.* § 114(f).

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[3] Prior to 2004, parties were required to submit their claims for statutory licensing fees to Copyright Arbitration Royalty Panels. This system was phased out by the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108-419, 118 Stat. 2341 (2004), codified in relevant part at 17 U.S.C. § 114(f).

At trial, BMG claimed that between November 1999 and May 2001 Launch—through LAUNCHcast—provided an interactive service and therefore was required to obtain individual licenses from BMG to play BMG's sound recordings. To demonstrate how LAUNCHcast functioned, BMG submitted an email from Jeff Boulter, Senior Director of Product Development at Launch, in which Boulter described how LAUNCHcast generated a list of songs using the user's preferences. In turn, Launch submitted a report from Margaret L. Johnson, a computer science professor at Stanford University, which also detailed how LAUNCHcast generated songs for a user.[4] There is no material dispute between the parties with regard to how LAUNCHcast works. The jury returned a verdict in favor of Launch.

BMG appeals the district court's denial of BMG's motions for dismissal under 12(b)(6), summary judgment after discovery, and judgment as a matter of law before the jury verdict, arguing that LAUNCHcast is an interactive service as a matter of law because LAUNCHcast is "designed and operated to enable members of the public to receive transmissions of programs specially created for them." BMG claims that under the DMCA there is no tipping point for the level of influence a user must assert before the program becomes an interactive service—all that matters is that the alleged copyright infringer is "transmi[tting] . . . a program specially created for" the user. Alternatively, BMG claims the district court's jury instruction was error in several respects.

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[4] The substance of Boulter and Johnson's accounts of LAUNCHcast operation are provided in greater detail *infra*.

Discussion

The district court charged the jury with determining whether LAUNCHcast was an interactive service within the meaning of § 114(j)(7). The district court indicated that it was for the jury "to decide how much influence a consumer or a recipient can have on the programing offered by the transmitting entity— . . . the broadcaster—before that activity must be characterized as interactive, keeping in mind the purpose of the statute." On two separate occasions the district court noted that "there is no bright line marking the limits between an interactive service and a noninteractive service." These instructions may have misled the jury into believing that it was the jury's responsibility to determine the legal definition of interactive, a task far beyond the scope of its duty. *See LNC Invs., Inc. v. First Fid. Bank, N.A., N.J.*, 173 F.3d 454, 467-68 (2d Cir. 1999).

But we need not determine the propriety of the instruction because we agree with BMG that the central issue of this case—interactivity—presents an issue of law.[5] The parties do not materially disagree on how LAUNCHcast works; their point of conflict centers on whether the program is "interactive" as defined by the statute—clearly an issue of law and therefore strictly under the purview of the courts. *See United States v. Nolan*, 136 F.3d 265, 271 (2d Cir. 1998).

An "interactive service" according to the statute "is one that enables a member of the public to

[5] BMG has argued as much by moving for dismissal under 12(b)(6), summary judgment, and for judgment as a matter of law on the issue of interactivity and appealing the denial of these motions to this Court.

receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." 17 U.S.C. § 114(j)(7). The statute provides little guidance as to the meaning of its operative term "specially created." According to Merriam-Webster's Collegiate Dictionary, "specially" means: (1) "in a special manner"; (2) "for a special purpose"; (3) "in particular" or "specifically"; or (4) "especially." Create, the root of "created," means: (1) "to bring into existence"; (2) "to produce"; (3) to "cause" or "occasion"; or (4) to "design."

These definitions indicate that a "specially created" program is a program produced or designed specifically for the user—not much help defining the terms of the statute in this case. BMG sees the issue as a simple one. BMG argues that any service that reflects user input is specially created for and by the user and therefore qualifies as an interactive service. But we should not read the statute so broadly. Justice Oliver Wendell Holmes once wrote that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (internal citation omitted). Holmes's observation seems pertinent here. The meaning of the phrase in question must significantly depend on the context in which Congress chose to employ it.

Congress extended the first copyright protection for sound recordings in 1971 by creating a right "[t]o reproduce and distribute" "tangible" copies of sound recordings. Sound Recording Act of 1971 (the

"SRA"), Pub. L. 92-140, 85 Stat. 391; *see also Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487-89 (3d Cir. 2003) (detailing the history and evolution of the sound recording copyright). Congress drafted the SRA to address its concern about preventing "phonorecord piracy due to advances in duplicating technology." H.R. Rep. No. 104-274, at 11 (1995) (summarizing the history of sound recording copyright). Notably, unlike the copyright of musical works, the sound recording copyright created by the SRA did not include a right of performance. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 10439, 109 Stat. 336, codified as 17 U.S.C. § 106. Therefore, holders of sound recording copyrights—principally recording companies such as BMG—had no right to extract licensing fees from radio stations and other broadcasters of recorded music. The reason for this lack of copyright protection in sound recordings, as the Third Circuit has put it, was that the "recording industry and [radio] broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings." *Bonneville Int'l Corp.*, 347 F.3d at 487. As the *Bonneville* court also noted, however, the relationship has been, and continues to be, "more nuanced" and occasionally antagonistic. *Id.* at 488 n.3. In response to continued lobbying by the recording industry, Congress and the Copyright Office (the "Office") studied the need for stronger copyright protection for sound recordings for two decades after passage of the SRA. *See* 141 CONG. REC. S11,945-04, 11,949 (daily ed. Aug. 8, 1995) (statement of Sen. Hatch).

With the inception and public use of the internet in the early 1990s, the recording industry became concerned that existing copyright law was insufficient to protect the industry from music piracy. At the time, the United States Register of Copyrights referred to the internet as "the world's biggest copying machine." Stephen Summer, *Music on the Internet: Can the Present Laws and Treaties Protect Music Copyright in Cyberspace?*, 8 CURRENTS: INT'L TRADE L. J. 31, 32 (1999). What made copying music transmitted over the internet more dangerous to recording companies than traditional analog copying with a tape recorder was the fact that there is far less degradation of sound quality in a digital recording than an analog recording. *See id.* Although data transmission over the internet was slow—in 1994 it took on average twenty minutes to download one song—the recording industry foresaw the internet as a threat to the industry's business model. *See* Judy Holland, *Music Industry is Encouraged*, STATES NEWS SERV., Jul. 24, 1994. If an internet user could listen to music broadcast over, or downloaded from, the internet for free, the recording industry worried that the user would stop purchasing music. Jason Berman, president of the Recording Industry Association of America (the "RIAA"), the lobbying arm of the recording industry, stated in 1994 that without a copyright in a right of performance via internet technology, the industry would be "unable to compete in this emerging digital era." Jube Shiver, Jr., *Digital Double Trouble*, L.A. TIMES (Apr. 11, 1994). Berman warned that "digital delivery would siphon off and eventually eliminate the major source of revenue for investing in future recordings" and that "[o]ver time, this

[would] lead to a vast reduction in the production of recorded music." Digital Performance Right in Sound Recording: Hearing on H.R. 1506 Before the H. Comm. on the Judiciary, Subcomm. on Courts & Intellectual Prop., 104th Cong. (1995) (statement of Jason Berman, President, RIAA).

The Commerce Department, which oversees the Copyright Office, recognized that failing to provide more protections to the recording industry would drive the music industry away from using the internet as a medium for legitimate music distribution. As then-Assistant Secretary of Commerce Bruce Lehman said, "If we don't make it clear you can't transmit a work without the permission of the owner, copyright owners aren't going to use the information highway . . . . There won't be any cars on the highway if we don't make certain the cars don't get hijacked at the entrance ramp." Teresa Riordan, *Writing Copyright Law For an Information Age*, N.Y. TIMES (Jul. 7, 1994) (internal quotation marks omitted). In a white paper to President Clinton, an information infrastructure task force chaired by Lehman recommended that Congress give sound recording copyright holders a right of performance. Bruce A. Lehman, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, INFORMATION INFRASTRUCTURE TASK FORCE 221-25 (1995).

In light of these concerns, and recognizing that "digital transmission of sound recordings [were] likely to become a very important outlet for the performance of recorded music," Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (the "DPSR"), giving sound recording copy-

right holders an exclusive but "narrow" right to perform—play or broadcast—sound recordings via a digital audio transmission. H.R. Rep. No. 104-274, at 12, 13-14. The right was limited to exclusive performance of digital audio transmissions through paid subscriptions services and "interactive services." *See* 17 U.S.C. § 114(d) (1995). While non-interactive subscription services qualified for statutory licensing, interactive services were required to obtain individual licenses for each sound recording those interactive services played via a digital transmission. *See* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 692 (2003). Under the DPSR, interactive service was defined as

> one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

17 U.S.C. § 114(j)(4) (1995).

The House report noted that the DPSR was enacted to address two related concerns. First, without "appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies." H.R.

Rep. No. 104-274, at 13. Second, "certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work." *Id.* With regard to the latter concern, the House noted that "interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." *Id.* at 14. As one article has noted, these interactive services were likely to have an impact on record sales "because the more *advance* information the user has about the digital transmission, the more the transmission facilitate[d] a user's private copying (in perfect digital copies) of the recorded performance, or, at least, enable[d] the user to substitute listening to the targeted performance for purchasing a copy of it." Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 167 (1999) (emphasis added).

The House also noted the importance of striking a balance between, on one hand, protecting sound recording copyright holders to promote sales, distribution, and development of new music, and, on the other hand, making development of new media and forms of distribution "economically [ ]feasible." H.R. Rep. No. 104-274, at 14. Congress attempted to address this concern by making the right "narrow"—limiting it to performance of digital audio transmissions and exempting nonsubscriber services. *See id.* The Senate Report noted that it had similar concerns. *See* S. Rep. 104-128, at 13-17 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 360-64.

Fairly soon after Congress enacted the DPSR, critics began to call for further legislation, charging that the DPSR was too narrowly drawn and did not sufficiently protect sound recording copyright holders from further internet piracy. *See* Summer, 8 CURRENTS: INT'L TRADE L. J. at 36; *see also* Public Performance of Sound Recordings: Definition of Service, 65 Fed. Reg. 77330, 77,331 (letter of the Copyright Office noting that the digital transmission of sound recording "license was amended in 1998 in response to the rapid growth of digital communications networks, *e.g.*, the Internet, and the confusion surrounding the question of how the DP[S]R[ ] applied to certain nonsubscription digital audio services"). For instance, webcasting services, which provide free—i.e., nonsubscription—services that do not provide particular sound recording on request and are therefore not interactive within the meaning of term under the DPSR, at that time fell outside the sound recording copyright holder's right of control. *See* Ginsburg, 23 COLUM.-VLA J.L. & ARTS at 167. Recording companies became concerned that these webcasting services were allowing users to copy music transmitted to their computer via webcast for free, *see* Note, June Chung, *The Digital Performance Right in Sound Recording Act and Its Failure to Address the Issue of Digital Music's New Form of Distribution*, 39 ARIZ. L. REV. 1361, 1367 (1997) (explaining how a webcasting user could record and copy webcasted music onto the user's computer), or to listen to these webcasting services in lieu of purchasing music, *see* Comment, Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with*

Itself, 24 HASTINGS COMM. & ENT. L.J. 1, 12-13 (2001). Record companies were concerned that these webcasting services were causing a diminution in record sales, which the companies feared would cut into profits and stunt development of the recording industry. *See* Craft, 24 HASTINGS COMM. & ENT. L.J. at 12-13. According to Cary Sherman, Senior Executive Vice President and General Counsel of the RIAA, by 1997, the record industry was losing $1 million a day due to music piracy. Copyright Piracy in the Internet: Hearing on H.R. 2265 Before H. Comm. on the Judiciary, Subcomm. on Courts & Intellectual Prop., 105th Cong. (1997) (statement of Cary H. Sherman, Senior Executive Vice President and General Counsel of the RIAA).

In light of these concerns, Congress enacted the current version of § 114 under the DMCA in 1998. The term "interactive service" was expanded to include "those that are specially created for a particular individual." H.R. Rep. No. 105-796, at 87 (1998) (Conf. Rep.). As enacted, the definition of "interactive service" was now a service "that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." 17 U.S.C. § 114(j)(7).

According to the House conference report,

> The conferees intend that the phrase "program specially created for the recipient" be interpreted reasonably in light of the remainder of the definition of "interactive service." For example, a service would be interactive if it allowed a small number of

> individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners.

H.R. Rep. No. 105-796, at 87-88 (Conf. Rep.).

The House report continued that a transmission is considered interactive "if a transmission recipient is permitted to select particular sound recordings in a prerecorded or predetermined program." *Id.* at 88. "For example, if a transmission recipient has the ability to move forward and backward between songs in a program, the transmission is interactive. It is not necessary that the transmission recipient be able to select the actual songs that comprise the program." *Id.*

On April 17, 2000, the Digital Media Association ("DiMA"), the lobbying arm of transmitters of digital media such as Launch, filed a petition with the Copyright Office requesting that the Office amend the definition of "service" "to state that a service is not interactive simply because it offers the consumer some degree of influence over the programming offered by the webcaster." DiMA asked the Copyright Office to adopt the following as a rule:

> A Service making transmissions that otherwise meet the requirements for the section 114(f) statutory license is not rendered "interactive," and thus ineligible for the statutory license, simply because the consumer may express preferences to such Ser-

> vice as to the musical genres, artists and sound recordings that may be incorporated into the Service's music programming to the public.

The DiMA did not ask the Copyright Office to determine whether any particular services was non-interactive.

On November 21, 2000, the Copyright Office issued a letter stating that because "of the rapidly changing business models emerging in today's digital marketplace, no rule can accurately draw the line demarcating the limits between an interactive service and a noninteractive service. Nor can one readily classify an entity which makes transmissions as exclusively interactive or noninteractive." The Copyright Office stated that determinations of interactivity "must be made on a case-by-case basis after the development of a full evidentiary record."

Despite refusing to make a broad rule governing interactivity, the Copyright Office did opine that in enacting the § 114(j)(7), "Congress sought to identify a service as interactive according to the amount of influence a member of the public would have on the selection and performance of a particular sound recording." However, the Office stated that "the fact that some degree of consumer influence on a service's programming is permissible does not mean that a regulation to clarify that fact is necessary or even desirable." The Copyright Office also noted that "because the law and the accompanying legislative history make it clear that consumers can have some influence on the offerings made by a service without making the service interactive, there is no need to amend the regulations to make this point."

In a footnote, the Copyright Office noted that the RIAA and DiMA had discussed LAUNCHcast "to illustrate the type of offerings that are in dispute." The Copyright Office concluded that "[f]rom these descriptions, there is considerable doubt whether [LAUNCHcast] would qualify as an 'interactive service.'" On December 8, 2000, the Copyright Office posted a message on its website that there had been a typographical error in its letter. It then reissued its letter with identical substantive language, but altered the footnote to read: "From these descriptions, there is considerable doubt whether [LAUNCHcast] would qualify as a noninteractive service." In the published version of the letter, however, the Copyright Office again altered the footnote to read as it had read in the November 21, 2000 letter—noting that there was considerable doubt that LAUNCHcast was interactive.[6] Public Performance of Sound Recordings, 65 Fed. Reg. at 77332.

In sum, from the SRA to the DMCA, Congress enacted copyright legislation directed at preventing the diminution in record sales through outright piracy of music or new digital media that offered lis-

[6] In a memorandum from Kenneth L. Steinthal, attorney for Launch, admitted into evidence at trial, Steinthal stated that he spoke with the individual in the Copyright Office who drafted the footnote. Steinthal stated that according to that individual, someone from the RIAA had called the Copyright Office and as a result, the substance of the footnote was changed. According to Steinthal, the individual told him that the footnote "had been intended to send a message . . . that . . . it would be a 'long shot' for a service such as Launchcast . . . to be considered non-interactive." Whatever the etiology of the Copyright Office's inability to make up its mind, we find the Copyright Office efforts here of little help.

teners the ability to select music in such a way that they would forego purchasing records.

Armed with the statute's text and context, we must examine the complex nature of the service LAUNCHcast provided.[7] Throughout the life of this case, the parties have expressed little disagreement as to how LAUNCHcast operates, however, the conclusions they reach as to whether the statute applies to LAUNCHcast are, not surprisingly, radically different.[8]

After creating a username and password, and entering basic information and preferences unrelated to the music LAUNCHcast provides, a LAUNCHcast user is able to create and modify personalized radio stations. First, the user is prompted to select artists whose music the user prefers. The user is then asked which music genres the user enjoys and asked to rate the genres on a scale. The user is also asked the percentage of new music—songs the user has not previously rated—the user would like to incorporate into the user's station (the "unrated quota")[9] and whether the user permits playing songs with profane lyrics. The minimum unrated

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[7] For the following analysis of LAUNCHcast's service we rely on Plaintiffs' Exhibits 260 and 262, in which Boulter describes how LAUNCHcast operated, as well as the report submitted by Johnson offering essentially the same analysis.

[8] Federal judges are appointed for life. U.S. CONST. art. III, § 1. Our familiarity with the ever-changing terms and technology of the digital age is, to say the least, varied. We have attempted to portray the processes and procedures of LAUNCHcast in lay terms, understandable to ourselves and the public.

[9] LAUNCHcast disregards the unrated quota selected by the user if the number of rated songs LAUNCHcast uses to generate a playlist for the user is less than 100. This is detailed further *infra*.

quota is 20%, meaning no less than 20% of the songs played can be unrated.

Once LAUNCHcast begins playing music based on the user's preferred artists and genres, the user rates the songs, artists, or albums LAUNCHcast plays between zero and 100, with 100 being the best rating. Below the rating field are hyperlinks termed "history," "share," and "buy." The history hyperlink allows the user to see a list of the songs previously played, and the buy hyperlink facilitates the user's purchase of the songs. The share hyperlink allows the user to share the station with other users. This feature facilitates the "subscription" of one user to another user's station. When user A subscribes to the station of user B, user B becomes a "DJ" for user A. The DJ feature of LAUNCHcast does not allow a user to play particular songs for other users, but instead gives users access to each other's stations, which they can modify by rating songs, artists, or albums. These modifications only affect what songs the user hears on the DJ's station and do not affect the songs the DJ hears on the DJ's station, nor do the modifications affect the DJ's personal modification of the DJ's station. While a song is playing, the user has the ability to pause the song, skip the song, or delete the song from the station by rating the song zero. Notably, the user may not go back to restart the song that is playing, or repeat any of the previously played songs in the playlist.

Whenever the user logs into LAUNCHcast and selects a station, LAUNCHcast generates a playlist of fifty songs based on several variables.[10] LAUNCH-

[10] If there are more than eight songs left unheard on the playlist previously begun by the user during the last session, the playlist is less than a week old, and fewer than fifteen songs of

cast does not provide a list of the pool of songs or of the songs in the generated playlist, and therefore, the user does not know what songs might be played. LAUNCHcast selects the songs by first looking to the unrated quota and whether to exclude songs with profane lyrics or songs that cannot be transmitted over the user's bandwidth. Next LAUNCHcast creates a list of all the potential songs that can be put in the playlist (called a "hashtable"). LAUNCHcast then generates a list of all songs played for the user within the last thirty days, a list of all DJs, genres, and radio stations to which the user subscribes, and a list of all the ratings of all the songs, artists, and albums rated by either the user or any DJ to which the user subscribes.[11] Songs that the user has rated are "explicitly rated" songs. LAUNCHcast "implicitly rates" songs that appear in an album that the user or a subscribed-to DJ has rated and songs that appear in the same album as another song the user has already rated.[12] All of these songs are initially added to the hashtable. LAUNCHcast then

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the playlist that have been played have been rated by the user for the first time, then LAUNCHcast will begin the old playlist from the first unheard song.

[11] Ratings for individual songs are modified based on the ratings the user (or the DJ to which the user subscribes) has given the artist performing the song or the album on which the song appears. The scope of the modification is irrelevant for purposes of this opinion.

[12] In other words, if the user rates the band U2 or U2's album The Joshua Tree, then U2's song "With or Without You" on the album will be implicitly rated. Likewise, if the user rates Gordon Lightfoot's song "Rainy Day People" but does not rate Lightfoot's iconic song "Canadian Railroad Trilogy"—found on a different album—"Rainy Day People" will be explicitly rated while "Canadian Railroad Trilogy" will be implicitly rated.

excludes: (1) all songs that the user, or a DJ to which the user subscribes, requests be skipped permanently (rated as zero) and (2) songs played within the last three hours for the user on any LAUNCHcast station. This yields approximately 4,000 songs.

LAUNCHcast then adds to the hashtable the 1,000 most popular songs—songs most highly rated by all LAUNCHcast users—in the bandwidth specified by the user, provided those songs are not already on the hashtable. LAUNCHcast then adds another 5,000 songs. To generate this group of songs, LAUNCHcast first counts the total number of songs contained in each of all the genres the user has selected and divides that number by the total number of songs in LAUNCHcast's database. If the resulting quotient is less than 5% of the number of songs in LAUNCHcast's database then LAUNCHcast picks only songs listed as within the genres the user has selected.[13] This calculation is performed in order to ensure that of the 5,000 "random" songs added to the hashtable, a sufficiently large number are of genres eligible to be selected for inclusion on the final playlist. That means that when a user has selected a very small number of genres, the selection of songs of those genres from the hashtable would return only a few songs allowable for play.

If the quotient of total songs in the user's selected genres is greater than 5%, however, a sufficiently

[13] For example, if the user selects five genres and LAUNCHcast has 1,000 songs listed under each of those genres, with no songs being counted twice for being in multiple genres, and 150,000 songs in its database (the total number of songs in LAUNCHcast's database at that time according to Boulter), then the total number of songs in a selected genre is 5,000. Because 5,000 is 3.3% of 150,000, LAUNCHcast would choose the 5,000 songs from this pool.

large number of the 5,000 randomly chosen songs added to the hashtable will be eligible for inclusion on the final playlist such that limiting the selection of playlist songs by genre will not perceptively decrease the randomness of the songs actually played; therefore, LAUNCHcast picks the 5,000 songs randomly from its entire database, rather than solely from the user's selected genres.

At this point, the hashtable contains approximately 10,000 songs. All of the songs in the hashtable are then sorted according to rating: (1) explicitly rated; (2) implicitly rated; or (3) unrated. Based on these categories, LAUNCHcast determines which songs will be played from each category based on several criteria. First, if the user's list of explicitly and implicitly rated songs is smaller than 100, 90% of the songs LAUNCHcast selects for the playlist are unrated. If the user's list of explicitly and implicitly rated songs is greater than 100, LAUNCHcast uses the unrated quota provided by the user—the minimum unrated quota the user can choose being 20%.[14] Second, no more than 20% of all explicitly rated songs are selected from the hashtable for the playlist. In other words, if a user has only rated ten songs, no more than two of those songs can be selected for the playlist. Third,

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[14] The record is unclear whether the unrated quota—if not selected by the user—was fixed at 50% or 20%. *See* Plaintiffs' Exhibits 260, 447. However, for our purposes the dispute is irrelevant because in determining whether LAUNCHcast is an interactive service we consider the particular aspect of LAUNCHcast that is the most interactive, or in other words, the aspect that provides the user with the greatest possible amount of influence on the outcome of the LAUNCHcast playlist. Therefore, we assume a user has a 20% unrated quota.

LAUNCHcast selects no more than three times the quotient of the total number of explicitly rated songs divided by the sum of implicitly and explicitly rated songs. In other words, if a user rates five songs and ten others are implicitly rated—making a total of fifteen songs—then no more than one explicitly rated song can be selected (3 x (5/[5+10]) = 3 x 1/3 = 1). Fourth, if the user is listening to the station of a DJ and the total number of explicitly and implicitly rated songs is greater than 200, then the total number of explicit songs LAUNCHcast selects will be the lesser of 20% of all explicit songs or half of the songs to be selected in the playlist. In other words, if the user, who has explicitly rated 150 songs and as a result has fifty-one implicitly rated songs (totaling 201), selects the station of a DJ, twenty-five explicitly rated songs will be selected for the playlist from the DJ's station because half of the songs in the playlist of fifty[15] (twenty-five) is less than 20% of the number of explicitly rated song (20% of 150 = 30).

Next, after determining what songs can be selected from the hashtable, LAUNCHcast picks songs from the hashtable to add to the playlist. To do this, LAUNCHcast first selects a song at random from one of the three categories, explicitly rated, implicitly rated, or unrated, but with some restrictions. First, songs are excluded from the playlist if including them would violate the criteria listed above. Second, LAUNCHcast does not play the same song twice in a playlist. Third, LAUNCHcast excludes a song from a playlist if three other songs

[15] For purposes of describing how LAUNCHcast functions, Boulter "[a]ssume[s] the size of a playlist is 50 songs." We also assume this.

by that artist have already been selected for the playlist. In other words, if the Beatles' "Here Comes the Sun," "A Day in the Life," and "Eleanor Rigby" have already been selected for the playlist, no other Beatles' song could be added to the playlist. Fourth, LAUNCHcast excludes a song from a playlist if two other songs from the same album have already been selected for the playlist.[16] Fifth, LAUNCHcast has an additional layer to prevent songs by the same artist or from the same album from playing on the playlist. If a song being reviewed for selection for the playlist is by an artist already included in the playlist or from the same album as the previous song selected for the playlist, that song is excluded from the playlist unless—at the end of the process—a user has a playlist with less than 50 songs. Although selection is random, according to Boulter the algorithm used to select songs for the playlist "[is] biased towards the top" of the list—i.e., choosing more highly rated songs—"but would pick randomly from there. So maybe the first time it picked No. 2 and then it picked 37. Then maybe it picked one and then it picked 300." In her report, Johnson stated that "a random song from that particular list of songs is chosen . . . such that there is a high probability that the song is picked from the higher scored songs in the list."

Finally, once all fifty songs are selected for the playlist, LAUNCHcast orders the playlist. The ordering of the songs is random, provided LAUNCHcast does not play more than two songs in the same

[16] This could occur independent of the second rule if the album is a compilation of multiple artists.

album or three songs by the same artist consecutively.[17]

It is hard to think of a more complicated way to "select songs," but this is the nature of webcast music broadcasting in the digital age. Given LAUNCHcast's format, we turn to the question of whether LAUNCHcast is an interactive service as a matter of law.[18] As we have already noted, a webcasting service such as LAUNCHcast is interactive under the statute if a user can either (1) request—and have played—a particular sound recording, or (2) receive a transmission of a program "specially created" for the user. 42 U.S.C. § 114(j)(7). A LAUNCHCAST user cannot request and expect to hear a particular song on demand; therefore, LAUNCHcast does not meet the first definition of interactive. But LAUNCHcast may still be liable if it enables the user to receive a transmission of a program "specially created" for the user. It comes as no surprise to us that the district court, the parties, and

[17] This brings LAUNCHcast into compliance with the "sound recording performance complement," which limits webcasters to playing no more than three selections from a given record in a three-hour period. 17 U.S.C. § 114(d)(2)(C)(i), (j)(13).

[18] While we have on other occasions noted that "administrative agencies have broad discretion to interpret the statutes they are charged with implementing," *Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 258 (2d Cir. 2007), we will not give weight to the Copyright Office's footnote regarding LAUNCHcast in its December 2000 letter. Notwithstanding the fact that the footnote specifically discusses LAUNCHcast, the footnote is surplusage to the issue before the Office, and the history of its revisions—complete reversals of opinion by the Copyright Office over a matter of days—seriously call into question the thought process, if any, that went into drafting the footnote.

others have struggled with what Congress meant by this term.

The language and development of the DPSR and DMCA make clear that Congress enacted both statutes to create a narrow copyright in the performance of digital audio transmissions to protect sound recording copyright holders—principally recording companies—from the diminution in record sales. Congress created this narrow right to ensure that "the creation of new sound recordings and musical works [would not] be discouraged," and to prevent the "threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." H.R. Rep. No. 104-274, at 13-14.

Contrary to BMG's contentions, Congress was clear that the statute sought to prevent further decreases in revenues for sound recording copyright holders due to significant reductions in record sales, perceived in turn to be a result of the proliferation of interactive listening services.[19] If the user has suf-

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[19] While file-sharing services like Napster initially caused a decline in records sales, *see* Anita Hamilton, *The Pirates of Prime Time*, TIME, Feb. 25, 2002, at 54 (noting that in 2001 CD sales declined for the first time in a decade), recently webcasting services have been credited with "becom[ing] a massive driver in digital [music] sales" by exposing users to new music and providing an easy link to sites where users can purchase this music. Jeb Gottlieb, *Pandora Lifts Lid on Personalizing Online Radio*, BOSTON HERALD, Feb. 26, 2008, at 32; *see also SoundExchange Open to Bill Targeting Small Webcasters*, COMMC'NS DAILY, May 3, 2007 (noting that independent musician Mike Holden "enjoyed a 'huge increase' in iTunes downloads . . . when Pandora[, another webcasting service,] added his music"). The difference between the two types of services likely explains the different effect on record sales. File-sharing services allow users to copy music files to their computer, thereby enabling the user to listen to the music any time. Webcasting

ficient control over the interactive service such that she can predict the songs she will hear, much as she would if she owned the music herself and could play each song at will, she would have no need to purchase the music she wishes to hear. Therefore, part and parcel of the concern about a diminution in record sales is the concern that an interactive service provides a degree of predictability—based on choices made by the user—that approximates the predictability the music listener seeks when purchasing music.

The current version § 114(j)(7) was enacted because Congress determined that the DPSR was not up to the task of protecting sound recording copyright holders from diminution in record sales, presumably because programs not covered by the DPSR's definition of interactive service provided a degree of control—predictability—to internet music listeners that dampened the music listeners' need to purchase music recordings. By giving sound recording copyright holders the right to require individual licenses for transmissions of programs specially created for users, Congress hoped to plug the loophole the DPSR had left open for webcasting services.

To determine what additional service or program Congress intended to include as an interactive service under the DMCA, we look to what language was added to the definition of interactive service. One term notably absent from the DPSR definition, which was later included under the DMCA, is "transmission of a program." 17 U.S.C. § 114(j)(7). While not semantically identical, Title 17 defines "transmission program" as "a body of material that, as an

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services, however, do not allow the user to download files of the music being webcast, and therefore, do not enable music piracy.

aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit." 17 U.S.C. § 101. This definition views a transmission program as a body of material presented as a single unit, as opposed to a selection of individual works. Therefore, in expanding the definition of interactive service to include the transmission of programs specially created for the user, Congress intended to include bodies of pre-packaged material, such as groups of songs or playlists specially created for the user. Given this definition, we turn to the ultimate issue of whether the LAUNCHcast playlists, uniquely generated for the user each time the user selects a station, are specially created and therefore interactive.

Launch does not deny that each playlist generated when a LAUNCHcast user selects a radio station is unique to that user at that particular time. However, this does not necessarily make the LAUNCHcast playlist specially created for the user.[20] Based on a review of how LAUNCHcast functions, it is clear that LAUNCHcast does not provide a specially created program within the meaning of § 114(j)(7) because the webcasting service does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby—in the aggregate—diminishing record sales.[21]

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[20] While we decline to give weight to the Copyright Office's analysis in its November and December 2000 letters, it is worth noting that in these letters the Office found that the "RIAA readily acknowledges that consumers may express preferences for certain music genres, artists, or even sound recordings without the service necessarily becoming interactive."

[21] In its brief, BMG offers evidence of Launch describing LAUNCHcast as "interactive" in its marketing literature. But our

First, the rules governing what songs are pooled in the hashtable ensure that the user has almost no ability to choose, let alone predict, which specific songs will be pooled in anticipation for selection to the playlist. At least 60% of the songs in the hashtable are generated by factors almost entirely beyond the user's control. The playlist—a total of fifty songs—is created from a pool of approximately 10,000 songs, at least 6,000 of which (1,000 of the most highly rated LAUNCHcast songs among all users and 5,000 randomly selected songs) are selected without any consideration for the user's song, artist, or album preferences.[22] The user has control over the genre of songs to be played for 5,000 songs, but this degree of control is no different from a traditional radio listener expressing a pref-

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task is to determine whether LAUNCHcast was an interactive service as that term is defined in the statute and not how it was marketed to the public.

[22] This assumes that the word "specially" implies that the program was made by taking some of the user's preferences into consideration. We cannot conclude that a specially created program could include a playlist of completely random songs selected without regard for the user's preferences. First, such a result would make no sense because a unique playlist of random songs would be little different from a radio station streamed over the internet—which at least one Circuit has held only requires that a broadcaster pay a statutory—and not an individual—license. *See Bonneville Int'l Corp.*, 347 F.3d at 487. Second, such a random webcast should have no effect on record sales, and therefore imposing an individual licensing requirement for songs played on a random playlist would be inconsistent with the congressional purpose of combating diminutions in records sales. In its letters of November and December 2000, the Copyright Office noted that the "RIAA acknowledge[d] that all music programming services[, including webcasting services,] are likely to be influenced by their consumers' tastes."

erence for a country music station over a classic rock station. LAUNCHcast generates this list with safeguards to prevent the user from limiting the number of songs in the list eligible for play by selecting a narrow genre. Also, no more than 20% of the songs the user rates—marked by LAUNCHcast as explicitly rated—can be pooled in the hashtable, and no more than three times the number of explicitly rated songs divided by the total number of rated songs can be in the hashtable. This ensures that a limited number of explicitly rated songs will eventually be selected for the playlist. Ironically, this effectively means that the more songs the user explicitly rates, the less the user can predict which explicitly rated songs will be pooled in the hashtable and played on the playlist.

Second, the selection of songs from the hashtable to be included in the playlist is governed by rules preventing the user's explicitly rated songs from being anywhere near a majority of the songs on the playlist. At minimum, 20% of the songs played on the station are unrated—meaning the user has never expressed a preference for those songs. If the user attempts to increase her chances of hearing a particular song by rating only a small number of songs—making the user's list of explicitly and implicitly rated songs smaller than 100—90% of the songs LAUNCHcast selects for the playlist will be unrated, flooding the playlist with songs for which the user has never expressed a preference.

Even the ways in which songs are rated include variables beyond the user's control. For instance, the ratings by all of the user's subscribed-to DJs are included in the playlist selection process. When the user rates a particular song, LAUNCHcast then

implicitly rates all other songs by that artist, subjecting the user to many songs the user may have never heard or does not even like.[23] There are restrictions placed on the number of times songs by a particular artist or from a particular album can be played, and there are restrictions on consecutive play of the same artist or album. Finally, because each playlist is unique to each user each time the user logs in, a user cannot listen to the playlist of another user and anticipate the songs to be played from that playlist, even if the user has selected the same preferences and rated all songs, artists, and albums identically as the other user. Relatedly, a user who hears a song she likes and wants to hear again cannot do so by logging off and back on to reset her station to disable the restriction against playing the same song twice on a playlist. Even if a user logs off LAUNCHcast then logs back on and selects the same station, the user will still hear the remainder of the playlist to which she had previously been listening with its restrictions still in operation, provided there were at least eight songs left to be played on the playlist—or, in other words, until the user listens to at least forty-two of the playlist's songs.

Finally, after navigating these criteria to pool a hashtable and generate a playlist, LAUNCHcast randomly orders the playlist. This randomization is limited by restrictions on the consecutive play of artists or albums, which further restricts the user's ability to choose the artists or albums they wish to hear. LAUNCHcast also does not enable the user to view

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[23] It would be wrong, for instance, to assume that because a user likes the Beatles' album A Hard Day's Night the user would also like The White Album.

the unplayed songs in the playlist, ensuring that a user cannot sift through a playlist to choose the songs the user wishes to hear.

It appears the only thing a user can predict with certainty—the only thing the user can control—is that by rating a song at zero the user will not hear that song on that station again. But the ability not to listen to a particular song is certainly not a violation of a copyright holder's right to be compensated when the sound recording is played.[24]

In short, to the degree that LAUNCHcast's playlists are uniquely created for each user, that feature does not ensure predictability. Indeed, the unique nature of the playlist helps Launch ensure that it does not provide a service so specially created for the user that the user ceases to purchase music. LAUNCHcast listeners do not even enjoy the limited predictability that once graced the AM airwaves on weekends in America when "special requests" represented love-struck adolescents' attempts to communicate their feelings to "that special friend." Therefore, we cannot say LAUNCHcast falls within the scope of the DMCA's definition of an interactive service created for individual users.

When Congress created the sound recording copyright, it explicitly characterized it as "narrow." There

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[24] The hyperlink in LAUNCHcast giving users the option to buy the music being played also cuts against the contention that LAUNCHcast's service diminishes record sales, as does the option to view a list of previously played songs, which would give the user a reference for selecting songs to purchase. *See* Music and Radio: Hearing before S. Jud. Comm., 110th Cong. (2008) (statement of Joe Kennedy, President and Chief Executive Officer Pandora Media, Inc.) (claiming that "Pandora [is] . . . among the top promotional partners of iTunes and Amazon.com" for music).

is no general right of performance in the sound recording copyright. There is only a limited right to performance of digital audio transmission with several exceptions to the copyright, including the one at issue in this case. We find that LAUNCHcast is not an interactive service within the meaning of 17 U.S.C. § 114(j)(7). Because we so conclude, we need not reach the other issues raised by BMG on appeal.

Conclusion

The district court's judgment of May 16, 2007 in favor of Appellee is hereby AFFIRMED with costs.

17 U.S.C.A. § 114

(j) Definitions.—As used in this section, the following terms have the following meanings:

* * *

(7) An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

HOUSE OF REPRESENTATIVES
105th CONGRESS *2d Session*
REPORT 105-796

DIGITAL MILLENNIUM COPYRIGHT ACT

OCTOBER 8, 1998.—Ordered to be printed

Mr. COBLE, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2281]

* * *

Subsection 114(j)(7)—"interactive service." The definition of "interactive service" is amended in several respects. First, personalized tranmissions—those that are specially created for a particular individual—are to be considered interactive. The recipient of the transmission need not select the particular recordings in the program for it to be considered personalized, for example, the recipient might identify certain artists that become the basis of the personal program. The conferees intend that the phrase "program specially created for the recipient" be interpreted reasonably in light of the remainder of the definition of "interactive service."

For example, a service would be interactive if it allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners.

Second, a transmission of a particular sound recording on request is considered interactive "whether or not [the sound recording is] part of a program." This language clarifies that if a transmission recipient is permitted to select particular sound recordings in a prerecorded or predetermined program, the transmission is considered interactive. For example, if a transmission recipient has the ability to move forward and backward between songs in a program, the transmission is interactive. It is not necessary that the transmission recipient be able to select the actual songs that comprise the program. Additionally, a program consisting only of one sound recording would be considered interactive.

Third, the definition of "interactive service" is amended to clarify that certain channels or programs are not considered interactive provided that they do not substantially consist of requested sound recordings that are performed within one hour of the request or at a designated time. Thus, a service that engaged in the typical broadcast programming practice of including selections requested by listeners would not be considered interactive, so long as the programming did not substantially consist of requests regularly performed within an hour of the

request, or at a time that the transmitting entity informs the recipient it will be performed.

The last sentence of the definition is intended to make clear that if a transmitting entity offers both interactive and noninteractive services then the noninteractive components are not to be treated as part of an interactive service, and thus are eligible for statutory licensing (assuming the other requirements of the statutory license are met). For example, if a Web site offered certain programming that was transmitted to all listeners who chose to receive it at the same time and also offered certain sound recordings that were transmitted to particular listeners on request, the fact that the latter are interactive transmissions would not preclude statutory licensing of the former.

PLAINTIFFS' EXHIBIT 234

LAUNCHCAST DEBUTS FOR MAC USERS

Macintosh Users Can Now Experience Leading Audio and Video Streaming Service LAUNCHcast

Santa Monica, CA (November 14, 2000) – LAUNCH Media Inc. (LAUN) announced today the availability of its popular streaming service, LAUNCHcast, to Macintosh users. With the addition of LAUNCHcast in RealNetworks® RealPlayer® streaming media technology, Macintosh web surfers can now become their very own DJ or VJ and create customized LAUNCHcast streaming radio or video stations tailored to their music preferences.

LAUNCHcast is a revolutionary music experience that uses patent-pending technology to put its users in command of their music choices. As users access LAUNCHcast's extensive music library, they rate songs, albums and artists to build a station that truly reflects their individual tastes. Over time, LAUNCHcast learns and intuitively plays the songs music fans like and introduces new music they probably will. Since its inception, LAUNCHcast users have generated over 93 million album, artist, song and genre ratings to customize their stations.

"LAUNCH welcomes the extensive audience of Macintosh enthusiasts who will not only have access to great LAUNCH.com content, but can experience the best in streaming audio and video," said David Goldberg, CEO of LAUNCH. "LAUNCHcast is an innovative service that gives music fans access to the

music they want and allows them to be part of a large interactive music community.

As part of the LAUNCHcast community, users can sample other DJ stations and also check out Fan Stations, which are stations featuring songs rated highly by fans of a specific artist. Currently, there are over 500,000 user-created stations and 24,000+ Artist Fan stations to choose from. Additionally, LAUNCHcast also has a "RATE MUSIC" section, where users can browse music by genre and popularity or search for a particular artist. In this section LAUNCHcast users find out what others are listening to and what songs are favorites within the community.

LAUNCH.com currently provides its over 5 million registered members with a wide selection of streaming audio and video, as well as exclusive artist features, concert information, and chats covering all genres of music. In addition, LAUNCH.com is currently the Web's leader in music video content with over 6,400 videos on-demand in a variety of music genres.

About LAUNCH

Headquartered in Santa Monica, CA, LAUNCH Media, Inc. (Nasdaq: LAUN) is a media company dedicated to creating the premier Internet music site, LAUNCH.com, by providing music fans with the broadest array of music and music-related editorial content. LAUNCH.com provides visitors with a wide selection of streaming audio, the Web's largest collection of music videos, exclusive artist features and music news covering all genres of music. Additionally, LAUNCH.com offers music customization with

LAUNCHcast, an intelligent music service that enables members to design their own streaming music station with high quality audio or video.

LAUNCH is engaged in strategic relationships with Sony Music, EMI Music, Warner Music Group, AOL, Microsoft, NBCi, Intel, RealNetworks, NetZero, Yahoo!, Yahoo! Japan, Tokyo Broadcasting System, SOFTBANK Ventures, Road Runner and others.

This announcement contains forward-looking statements that involve risks and uncertainties including, among others, LAUNCH Media, Inc. operating history, anticipated loss, the unpredictability of its future revenues, competition, risks associated with management of potential growth, and risks of new business areas, international expansion, business combinations, and strategic alliances. Actual results could differ materially from those discussed. More information about factors that potentially could affect LAUNCH's financial results are included in the Company's filings with the Securities and Exchange Commission, including its Form 10-K filed December 31, 1999, as amended, each available online at http//www.sec.gov. All forward-looking statements are based on information available to the Company on the date hereof, and the Company assumes no obligation to update such statements.

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PLAINTIFFS' EXHIBIT 265

LAUNCH MEDIA DEBUTS REVOLUTIONARY NEW MUSIC SERVICE: LAUNCHCAST

LAUNCH.com Delivers "Music That Listens To You"

Santa Monica, CA, November 11, 1999 – LAUNCH Media, Inc. (Nasdaq: LAUN) announced today the debut of LAUNCHcast, a new service that will revolutionize music listening on the Internet. LAUNCHcast is an intelligent music service that learns from users' musical preferences. Unlike traditional Internet "radio" players that only offer genre-based, preprogrammed channels, LAUNCHcast gives users the opportunity to design their own streaming music station. Starting today, LAUNCH.com members will have access to the beta preview of LAUNCHcast, exclusively on LAUNCH.com (www.launch.com). The final consumer release is expected to be available in early 2000.

LAUNCH.com members will have the ability to become a "DJ" by creating a LAUNCHcast station tailored to their musical tastes. By rating songs, albums, artists and sampling other community members' stations, users teach LAUNCHcast to play the type of music they want. Highly-rated songs will be played more frequently than lower rated songs. LAUNCHcast users have the ability to subscribe to other members' stations which will influence the music that they hear. LAUNCHcast also features the capability to inform users why songs are being played, as well as connect them to other LAUNCHcast users who like the song they're listening to.

LAUNCH Media has developed the innovative technology behind LAUNCHcast and currently has a patent pending on its unique features. LAUNCHcast exclusively utilizes the latest Windows Media audio compression technology, offering very high audio quality on the Internet. LAUNCHcast complies with the statutory performance license requirements of the Digital Millennium Copyright Act.

"Combining technology with our vision of a great online music experience, we wanted to provide our users with a superior streaming music service. That's why we created LAUNCHcast," says Dave Goldberg, CEO of LAUNCH. "Users should have the ability to get the music that they like, with outstanding audio quality. We think LAUNCHcast achieves this goal."

"We are really excited that Windows Media is being used for such an innovative service as LAUNCHcast," says Will Poole, general manager, marketing and business development, Streaming Media Division at Microsoft. "LAUNCHcast will increase the level of consumer expectations for high quality personalized streaming music on the Web."

Charter sponsors for LAUNCHcast include The Wrigley Company, Heinz, Ford Motor Company, and U.S. Navy. LAUNCHcast provides a powerful way for advertisers to reach LAUNCH's user base through audio ads, banner ads and co-branded versions of the player.

With over 2 million registered users, LAUNCH.com currently offers exclusive artist biographies and features, album reviews and concert information, audio downloads, and one of the largest music video

libraries on the Web. Personalization capabilities allow users to create customized music home pages, giving members exclusive access to chart-topping and emerging talent.

About LAUNCH

Headquartered in Santa Monica, LAUNCH (Nasdaq: LAUN) is a digital media company focused on creating the premier Internet destination for discovering new music. Leveraging the inherent advantages of digital media, LAUNCH offers a compelling music discovery experience for consumers and provides a valuable marketing platform for record labels, artists, advertisers and merchants. LAUNCH delivers its content on the Internet at *www.launch.com* and on the monthly LAUNCH on CD-ROM.

This announcement contains forward-looking statements that involve risks and uncertainties including, among others, LAUNCH Media Inc.'s operating history, anticipated losses, the unpredictability of its future revenues, competition, risks associated with management of potential growth, and risks of new business areas, international expansion, business combinations, and strategic alliances. Actual results could differ materially from those discussed. More information about factors that potentially could affect LAUNCH's financial results are included in the Company's filings with the Securities and Exchange Commission, including its Registration Statement filed on April 23, 1999, as amended, each available online at http://www.sec.gov. All forward-looking statements are based on information available to the Company on the date

hereof, and the Company assumes no obligation to update such statements.

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PLAINTIFFS' EXHIBIT 368

(13) INTERNATIONAL APPLICATION
PUBLISHED UNDER THE PATENT
COOPERATION TREATY (PCT)

* * *

DISCLOSURE OF INVENTION

The present invention provides a copyright-compliant, broad-based, individually-tailored Internet media broadcast system and method. The present invention provides means by which users may individually rate or indicate music, music videos, or other recorded media that they enjoy hearing from a vast musical or other database. Additionally, such users may also indicate the exclusion of music/media that is to their distaste. In so doing, the user interaction is limited to that decision-making role that is necessary for the user to establish his or preferences. The internet radio of the present invention and its method take care of the rest, providing the end user a media or radio channel tailored to his or her own musical tastes. In this way, the present invention can be said to "microcast," or "narrowcast" the content of personalized songlists to individual listening stations or users. As the broadcast uses Internet protocol, each data packet of each data stream has its own individual address, namely, the end-user's data stream player. As the present invention is scalable, thousands, even tens or hundreds of thousands of listeners can be handled by the present invention. With the advance of data-transmission technology, tens or hundreds of millions of users may be served by, or given access to, a system incorporating the present invention,

including the delivery of user-preferred data streams by wireless communication links.

Mention is made herein of the present invention with respect to music broadcast to provide a personalized Internet, or data stream, radio. Note should be taken that use of the term "radio," "music," and the like includes any recorded datastream content, including music videos and the like.

At the core of the present invention is the playlist generator. It is the generated songlist that is associated with the user's account and indicates to the system which song is to be played next. Once a song has been selected, it is then streamed as data out to the individual's computer (uniquely identified by Internet protocol). As the central server of the system can handle a large number of users at any one time, it becomes possible to serve each user with his or her own individual data stream. In this case, the data stream comprises audio and/or video information and serves to establish a situation similar to each user having his or her own individual radio station that he or she programs. The list can be created in advance and stored, or generated, in real time when needed. Collaborative filtering techniques may be used in constructing the playlist.

Other applications for the present method may also exist when similar circumstances are present where a large database of information is available that is subject to individual preferences. In a broad sense, the present invention provides means by which individual subsets of an all-encompassing data space may be defined, modified, and preserved, subject to a variety of influences and allowing some serendipitous, or random, events to occur.

* * *

CLAIMS

What is claimed is:

1. A method for broadcasting data streams through a computer network to a user's computer, the steps comprising:

providing a database of data streams;

selecting a data stream according to a selection method;

transmitting one of said data streams to the user's computer;

receiving feedback expressing a preference from the user regarding said transmitted data stream;

and

updating said selection method to better reflect said preference of the user; whereby data streams transmitted to the user are biased according to said preference.

2. The method for broadcasting data streams through a computer network to a user's computer of Claim 1, further comprising:

said selection method including generating a list of data streams to transmit to the user's computer;

transmitting one of said listed data streams to the user's computer; and

updating said list of data streams to better reflect said preference of the user; whereby

data streams transmitted to the user are biased according to said preference.

3. The method for broadcasting data streams through a computer network of Claim 1, the steps further comprising:

receiving feedback expressing preferences from sources other than the user.

4. The method for broadcasting data streams through a computer network of Claim 3, wherein the step of receiving preferences from sources other than the user further comprises:

receiving feedback expressing preferences from the group consisting of other users, commercial radio stations, and lists of popular songs.

5. The method for broadcasting data streams through a computer network of Claim 1, further comprising:

informing the user generally regarding said database and said data streams;

querying the user as to data stream preference prior to generating an initial transmission list of data streams; whereby

said initial list reflects general preferences of the user.

6. The method for broadcasting data streams through a computer network of Claim 1, wherein said data streams are selected from the group consisting of songs and videos.

7. The method for broadcasting data streams through a computer network of Claim 1, wherein said transmitted data stream is removed from said transmission list.

8. The method for broadcasting data streams through a computer network of Claim 7, wherein said data stream removed from said transmission list is listed on a transmitted data stream list.

9. The method for broadcasting data streams through a computer network of Claim 1, wherein said step of transmitting one of said data streams further comprises transmitting said one of said data streams in conformance with applicable copyright law.

10. The method for broadcasting data streams through a computer network of Claim 9, wherein said conformance with applicable copyright law applies to all transmitted datastreams.

11. A data stream system for providing preferred data streams to a user, comprising:

a connection to a computer network, said computer network connected to a computer of the user;

a database of data streams, said database available to said computer network;

a data stream controller, said data stream controller transmitting data streams to said user's computer according to a selection program;

a user interface, said user interface coupled to said user's computer and receiving said data

streams for the user and providing a feedback mechanism for the user so that the user may indicate a preference regarding data streams transmitted by said data stream controller;

said selection program receiving indications from the user, said selection program modifying its selection of data streams for transmission to said user's computer according to said user preference; whereby

data streams selected by said selection program are biased according to said user preference.

12. The data stream system for providing preferred data streams to a user of Claim 11, wherein said computer network comprises the Internet.

13. The data stream system for providing preferred data streams to a user of Claim 11, wherein said database is a song database and the data streams are songs.

14. The data stream system for providing preferred data streams to a user of Claim 11, wherein said database is a music video database and the data streams are music videos.

15. The data stream system for providing preferred data streams to a user of Claim 11, wherein said user interface comprises an electronic media player.

16. The data stream system for providing preferred data streams to a user of Claim 15, wherein said electronic media player is selected from the

group consisting of RealPlayer, Apple QuickTime, and Windows Media Player.

17. The data stream system for providing preferred data streams to a user of Claim 11, wherein said selection program creates a list of data streams for transmission to the user.

18. The data stream system for providing preferred data streams to a user of Claim 17, wherein said selection program modifies said list of data streams for transmission to the user according to said user preference.

19. The data stream system for providing preferred data streams to a user as set forth in Claim 11, further comprising:

> said data stream controller transmitting said data streams in compliance with applicable copyright law.

20. The data stream system for providing preferred data streams to a user as set forth in Claim 19, further comprising:

> said data stream controller transmitting all data streams in compliance with applicable copyright law.

21. A user interface for an Internet datastream transmission system, comprising:

> a media player, said playing data streams;
>
> a rating tool, said rating tool indicating a rating for a data stream currently played by said media player; and

a data stream information display, said data stream information display displaying information for said data stream currently played by said media player; whereby

a user can indicate a preference regarding said data stream currently played by said media player.

22. A user interface for an Internet datastream transmission system as set forth in Claim 21, further comprising:

a playlist generator, said playlist generator generating playlists of data streams for said media player, said playlist generator selecting data streams according to preferences indicated by said user.

23. A user interface for an Internet datastream transmission system as set forth in Claim 22, further comprising:

said data streams selected by said playlist generator being in compliance with applicable copyright law.

* * *

PLAINTIFFS' EXHIBIT 429

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 25049

FORM 10-K

FOR ANNUAL AND TRANSITION REPORTS
PURSUANT TO SECTIONS 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Fiscal Year Ended December 31, 1999

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

Commission File Number 000-25273

LAUNCH MEDIA, INC.
(*Exact Name of Registrant as Specified in its Charter*)

Delaware	95-4463753
(State or Other Jurisdiction of Incorporation or Organization)	(I.R.S. Employer Identification Number)

2700 Pennsylvania Avenue,
Santa Monica, California 90404
(Address of Principal Executive Offices) (Zip Code)

(310) 526-4300
(Registrant's Telephone Number,
Including Area Code)

Securities Registered Pursuant
to Section 12(b) of the Act: None

Securities Registered Pursuant
to Section 12(g) of the Act:

Title of Each Class

Common Stock
(Par Value $.001 Per Share)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports) and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. Yes ☒ No

The aggregate market value of shares of Common Stock held by non-affiliates of the Registrant as of February 29, 2000, was approximately $232,940,000 based on the $18.25 closing price for the Common Stock on The NASDAQ National Market on such date. For purposes of this computation, all execu-

tive officers and directors of the registrant have been deemed to be affiliates. Such determination should not be deemed to be an admission that such directors and officers are, in fact, affiliates of the registrant.

The number of shares of Common Stock of the registrant outstanding as of February 29, 2000 was 13,496,373.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the registrant's definitive Proxy Statement relating to its Annual Meeting of Stockholders, to be filed with the Securities and Exchange Commission not later than 120 days after the end of the fiscal year covered by this report, are incorporated by reference into Part III of this report.

LAUNCH MEDIA, INC.

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PART I

Item 1. *Business*

Overview

Launch is a media company that offers a compelling online music discovery experience for consumers and provides a valuable marketing platform for record labels, artists, advertisers and merchants. We create engaging music content focused on both new and established artists, spanning almost all musical genres. Launch's consumers are not confined to receiving music content in the programmed linear sequences broadcast by radio and television. Instead we deliver personalized music content to our users in an interactive format based on their musical tastes and preferences. As part of our strategy to attract and retain registered members from our target audience, we have created a vibrant community of users who help each other discover new music by virtual word-of-mouth. Our music content encourages our members to engage in community activities, such as creating home pages, chatting online, listing friends and favorite artists and developing online friendships with others sharing similar tastes. Because our content is designed to attract and retain an audience composed principally of consumers who are 12 to 34 years old including the 12 to 20 year old segment that is part of Generation Y advertisers on Launch can target a valuable and elusive group of consumers. We currently deliver our content on the Interest at *www.launch.com* and on the monthly Launch on CD-ROM. As broadband access to the Internet achieves greater consumer acceptance and enables us to add our richest audio

and video content to *launch.com*, we intend to phase out delivery of Launch on CD-ROM. We also reach music consumers through the Online Music Group (OMG) a consolidation of music sites on the web designed to increase traffic for *launch.com* and other OMG member sites.

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PLAINTIFFS' EXHIBIT 430

LAUNCH Media, Inc. Annual Report 1999

About LAUNCH

Headquartered in Santa Monica, California, LAUNCH Media, Inc. (Nasdaq: LAUN) is a media company dedicated to creating the premier Internet music site, LAUNCH.com, providing music fans with a vast array of music, music videos and music-related editorial content on the Web.

LAUNCH.com gives visitors a wide selection of streaming audio, the Web's largest collection of music videos, concert listings, exclusive artist features and chats coveting all genres of music. LAUNCH.com also supplies members with the tools to receive music-related content personalized to their individual tastes. LAUNCHcast enables members to design customized streaming music stations, which play a constantly changing selection of songs based on the users' individual preferences. Through song, album and artist ratings, and samples of other community members' stations, LAUNCHcast learns to play the music individual members want to hear. LAUNCH.com also enables members to discover music through connecting with other members with similar music interests.

LAUNCH is engaged in strategic relationships with Sony Music, EMI Music, Warner Music Group, AOL, Microsoft, NBC, Snap, Road Runner, Intel, RealNetworks, NetZero, Yahoo!, Yahoo! Japan, SOFTBANK Ventures, CheckOut.com and others.

We have always loved music. Before LAUNCH, we learned about music from MTV, our favorite radio stations, and our friends. That was over ten years ago. While our friends have remained true, those other stations no longer introduce us to new artists or give us a place to be fans.

The Online Destination for Music Fans

We created LAUNCH as a place for all music fans, like us, to experience and discover music. As the online music destination, LAUNCH.com offers each music fan a vast array of information, entertainment and community features, personalized to their own tastes. Our mission is to serve the music fan by helping navigate the increasing wealth of music made available each year, and by providing a single source of quality information. Hundreds of other companies combine to finance, produce, market and sell various types of music to consumers. We help fans find music they like and decide what to purchase, whether in CD or downloadable form. We measure our success by those music fans that call LAUNCH their home for music online, much like many sports fans call ESPN home.

A music experience is nothing without the music itself and the opportunity to see the artist perform. As a result, our focus has always been on high-quality audio and video content. We not only license music and music videos from major and independent record companies, but we also regularly invite artists into our studios to perform and discuss their works. To date, we have entered into license agreements with major record companies including Warner Music Group, EMI and Sony Music, and now

have over 3,500 music videos available on demand, with more being added each week. In addition, our acquisitions of JBTV and National Video Subscriptions have provided us access to substantial music video tape libraries.

Most importantly, we continue to see that these music videos, and our proprietary video content in particular, are very "sticky" content that keep users engaged for long periods of time. In December of 1999, we streamed over 2 million music videos. We were further encouraged by the fact that our users with broadband connections were already consuming more video content than those with slower connections. As broadband access continues to expand, we expect to benefit from this promising trend.

LAUNCH surrounds the music and video content with in-depth information about artists and their music. This content includes such things as biographies, reviews, tour information, discographies and news. The music information we provide often draws consumers to LAUNCH and supports our mission of offering a complete online music destination.

Interactive media is not constrained by having to program particular content at consumers based upon arbitrary segmentations such as musical genre or target age group. Its power stems from its ability to aggregate disparate content in one place and provide each individual with the ability to navigate the content based on her tastes. We have always said that music is both very broad and very niche. Countless people like music but few can agree on exactly what is best. LAUNCH caters to this reality and empowers each registered member to express her preferences and receive targeted and recommended

content based on this profile. As our members invest more time in contributing their preferences, the customized experience improves, and substantial incentives are built to call our music site home.

Creating a Community Of Music Lovers

We mentioned that we learn about music from our friends. LAUNCH seeks to enable the broadest possible word-of-mouth by pointing our members to others with similar tastes and encouraging all to explore music that those other members like. We also want our members to be fans: to have the opportunity to chat with artists, build fan pages, and communicate with other fans. Our members generate content in the form of user reviews and also market the site by drawing attention to their own personal pages. Each LAUNCH's community features is designed to facilitate member communication, identity building, and, most importantly, music discovery.

Perhaps our proudest symbol of the harmony that exists when marrying compelling content with customization and community is our LAUNCHcast service. Debuted in beta form late last year, LAUNCHcast is a streaming audio service that allows our members to create their own channels based on their musical taste profiles. Members can also subscribe to other members' stations so that those preferences influence what music they hear. Early returns are encouraging as over 300,000 LAUNCHcast stations have been created to date, and the average LAUNCHcast session last over 50 minutes.

Attracting New Music Fans

Our business strategy starts with acquiring registered users. Once acquired, we count on the stickiness of our content and personalization features to keep our registered users coming back over time. We derive our primary revenue stream from selling access to our valuable consumer base to advertisers and commerce partners. We also leverage the content we create to generate either incremental revenue or increased traffic to LAUNCH.com by licensing the content to both online and offline partners. We are excited about our success in implementing our business strategy. In 1999, our pro forma revenues grew 95% to $18.3 million compared to $9.4 million for the full-year 1998.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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01 CV 4450 (RO)

New York, N.Y.
April 27, 2007
9:38 a.m.

ARISTA RECORDS, INC., BAD BOY RECORDS, BMG MUSIC d/b/a THE RCA RECORDS LABEL, CAPITOL RECORDS, INC., VIRGIN RECORDS AMERICA, INC., SONY MUSIC ENTERTAINMENT, INC., UMG RECORDINGS, INC., INTERSCOPE RECORDS, MOTOWN RECORD COMPANY, L.P., and ZOMBA RECORDING CORPORATION,

Plaintiffs,

—v.—

LAUNCH MEDIA, INC.,

Defendant.

Before:

HON. RICHARD OWEN,

District Judge

APPEARANCES

ARNOLD & PORTER, LLP
Attorneys for Plaintiffs
BY: HADRIAN R. KATZ
ROBERT A. GOODMAN
KIM L. RAPPAPORT
SARAH BRACKNEY
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SHARI MARKOWITZ SAVITT

* * *

THE COURT: * * *

So, getting down to our famous word, "interactive," under the copyright law, a webcasting service is defined as interactive if it enables a member of the public to receive a transmission of a program specially created for the recipient. You have heard that quite a bit here now, particularly this morning, in the closing arguments.

In defining the term "interactive," it is critical that you, the jury, be given the full understanding of the purpose of the statute, which was one that was designed to limit webcasting services that provide music in an interactive format such that the traditional record sales would not occur and thus be displaced, and therefore pose the greatest threat to the livelihood of those whose incomes depend upon revenues derived from traditional record sales.

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